2005

Douglas L. Stowell, Personal Representative of the estate of Gary W. Ostler, Deceased v. Ostler International, Inc., a Utah corporation; Ostler Property Development, Inc., a Utah corporation; Dale Ostler and Vyron Ostler : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH SUPREME COURT

DOUGLAS L. STOWELL, PERSONAL REPRESENTATIVE OF THE ESTATE OF GARY W. OSTLER, Deceased, Plaintiff/Appellant. v. OSTLER INTERNATIONAL, INC., a Utah corporation; OSTLER PROPERTY DEVELOPMENT, INC., a Utah corporation; DALE OSTLER and VYRON OSTLER, Defendants/Appellees.	**BRIEF OF APPELLANT** Case No. 20050636

APPEAL FROM ORDER ENTERED BY THE
THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY
HONORABLE BRUCE C. LUBECK

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Oral Argument Requested

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JURISDICTION

This appeal is taken from an Order of the Third Judicial District, Salt Lake County, entered by the Honorable Bruce C. Lubeck. This Court has jurisdiction pursuant to Utah Code Ann. § 78-2-2(3)(J).

STATEMENT OF ISSUES AND STANDARD OF REVIEW

I. ISSUES.

1. When a verbal shareholder agreement is made and partially performed by the sole shareholders of a closely held corporation, and the parties have a long-standing custom of honoring the agreement and performing thereunder, does Utah Code Ann. § 16-10a-732 nevertheless command that the agreement is invalid because not in writing? [Preserved at R. 47, 121, 122, 154-158, 194-197, 321-323].

2. When a verbal shareholder agreement is made and partially performed by the sole shareholders of a closely held corporation, and the parties have a long-standing custom of honoring the agreement and performing thereunder, does Utah Code Ann. § 16-10a-732 nevertheless command that the agreement is invalid because the shareholders intended but did not specifically declare that the agreement would extend for a term in excess of ten years?

[Preserved at R. 48, 123-124, 156, 197-198, 322-323].

3. Whether the shareholder agreement between Gary Ostler and Dale Ostler constituted a personal services agreement in which the right and entitlement of Gary Ostler could not be received and held by the personal representative of his estate and inherited by and assigned to his heirs?

[Preserved at R. 49-50, 131-134, 158-159, 201-203, 323-324].

II. STANDARD OF REVIEW.

The trial court's Ruling and Order granted Defendants' Motions to Dismiss made pursuant to Rule 12(b)(6), Utah Rules of Civil Procedure and is reviewed for correctness, accepting as true the factual allegations of the Complaint and drawing all inferences in favor of the Plaintiff. *Hunter v. Sunrise Title Company*, 2004 UT 1, ¶ 6, 84 P.3d 1163. Additionally, issues 1 and 2 require the interpretation of a statute. Questions of statutory interpretation present a question of law and are also reviewed for correctness. *Parks v. Utah Transit Authority*, 2002 UT 55, ¶ 4, 53 P.3d 473; *Board of Education of Jordan School District v. Sandy City Corporation*, 2004 UT 37, ¶ 8, 94 P.3d 234.

DETERMINATIVE CONSTITUTIONAL PROVISIONS STATUTES, RULES AND REGULATIONS

Utah Code Ann. § 16-10a-732, (1) and (2):

(1) An agreement among the shareholders of a corporation that complies with this section is effective among the shareholders and the corporation even though it is inconsistent with one or more other provisions of this chapter in that it:

(a) eliminates the board of directors or restricts the discretion or powers of the board of directors;

(b) governs the authorization or making of distributions whether or not in proportion to ownership of shares, subject to the limitations in Section 16-10a-640;
(c) establishes who shall be directors or officers of the corporation, or their terms of office or manner of selection or removal;
(d) governs, in general or in regard to specific mattes, the exercise or division of voting power by or between the shareholders and directors or by or among any of them, including use of weighted voting rights or director proxies;
(e) establishes the terms and conditions of any agreement for the transfer or use of property or the provision of services between the corporation and any shareholder, director, officer or employee of the corporation or among any of them;
(f) transfers to one or more shareholders or other persons all or part of the authority to exercise the corporate powers or to manage the business and affairs of the corporation, including the resolution of any issue about which there exists a deadlock among directors or shareholders;
(g) requires dissolution of the corporation at the request of one or more of the shareholders or upon the occurrence of a specified event or contingency; or
(h) otherwise governs the exercise of the corporate powers or the management of the business and affairs of the corporation or the relationship among the shareholders, the directors and the corporation, or among any of them, and is not contrary to public policy.

(2) An agreement authorized by this section shall be:
(a) set forth:
(i) in the articles of incorporation or bylaws and approved by all persons who are shareholders at the time of the agreement; or
(ii) in a written agreement that is signed by all persons who are shareholders at the time of the agreement and is made known to the corporation;
(b) subject to amendment only by all persons who are shareholders at the time of the amendment, unless the agreement provides otherwise; and
(c) valid for 10 years, unless the agreement provides otherwise.

Utah Code Ann. § 25-5-8:

Nothing in this chapter contained shall be construed to abridge the powers of courts to compel the specific performance of agreements in case of part performance thereof.

Official Commentary to Utah Revised Business Corporation Act, § 732.

See Addendum for Text

STATEMENT OF THE CASE

I. NATURE OF THE CASE, COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW.

Douglas L. Stowell is Personal Representative of the Estate of Gary W. Ostler, deceased, and as such and pursuant to § § 75-3-703, 708, 710 and 714, UTAH CODE ANN., is charged to and does hold all rights and interest held by Decedent at the time of Decedent's death. At the time of his death on July 13, 2003, Gary Ostler ("Gary Ostler") and Dale Ostler each owned 50% of the capital stock of Ostler International, Inc. ("Ostler International") and Ostler Property Development, Inc. ("Ostler Property Development") and were serving as the board of directors of both companies. They had incorporated Ostler International about January 13, 1988 and Ostler Property Development about July 14, 1993. Gary and Dale Ostler each agreed and represented to the other that each would own and control one-half of the equity interest of each company and that all policies and practices for the operation and conduct of the business of the two companies would be formulated and implemented only and solely with the mutual consent of the two shareholders. The companies were thereafter operated and managed pursuant to that agreement.

Following Gary Ostler's death, Dale Ostler appointed himself and Vyron Ostler as the board of directors of the two companies and adopted and implemented policies for the companies without seeking and obtaining the mutual consent of Douglas Stowell ("Mr. Stowell") who then held Gary Ostler's capital stock in his capacity as personal representative of the Gary Ostler estate. Dale Ostler would not accept Mr. Stowell, in his representative capacity, as a shareholder of the companies and would not permit Mr. Stowell's involvement in considering, addressing and determining the kind of matters which were the subject of the Gary Ostler and Dale Ostler agreement and their past custom and course of dealing. Mr. Stowell commenced this action, *inter alia*, seeking specific performance requiring Dale Ostler and the other Defendants to perform as previously agreed, undertaken and performed between Gary Ostler and Dale Ostler.

Defendants moved for dismissal pursuant to Rule 12(b)(6), Utah Rules of Civil Procedure. On or about June 9, 2005, the trial court entered its Ruling and Order. The court accepted the existence of the verbal agreements between Gary Ostler and Dale Ostler and the performance of the agreements by both of them prior to Gary Ostler's death. Notwithstanding, it ruled that because the agreements were verbal and because they did not specifically provide for a term beyond ten years, the agreements were invalidated by Utah Code Ann. § 16-10a-732 and were unenforceable both before and after Gary Ostler's death. Additionally, the court ruled that the agreements were a "personal agreement" between Gary Ostler and Dale Ostler and for that additional reason, could not survive Gary Ostler's death.

II. STATEMENT OF MATERIAL FACTS.

Gary W. Ostler and Dale Ostler were brothers. [R. 2, ¶ 2]. Each owned 50% of the capital shares of Ostler International and of Ostler Property Development. [R. 3, ¶ 10]. Ostler International was incorporated in January 1988. [R. 2, ¶ 8]. Ostler Property Development was incorporated in July 1993. [R. 3, ¶ 9]. Both companies are Utah corporations. [R. 2, ¶¶ 3-4]. Gary Ostler died in an airplane accident on July 13, 2003. On September 17, 2003, Douglas L. Stowell was appointed and continues to serve as Personal Representative of the Estate of Gary Ostler. [R. 2, ¶ 1]. The shares of capital stock of both companies are now held 50% by the Gary Ostler estate and 50% by Dale Ostler. [R. 3, ¶ 11].

Gary Ostler and Dale Ostler were the only incorporators of the two companies and each intended and represented to the other that each would own and control one-half of the equity interest of the companies. [R. 2, ¶ 8, R. 3, ¶ 9]. It was the intention, design, purpose and agreement of Gary Ostler and Dale Ostler that shares of the capital stock of the two companies neither should nor would, except upon their mutual consent and agreement as shareholders, be offered or provided to any other person. [R. 5, ¶ 22, R. 8, ¶ 28 and R. 11, ¶ 34].

Both Gary Ostler and Dale Ostler verbally agreed that all policy of the companies would be adopted and implemented and the companies managed, operated and their business conducted only upon and pursuant to the mutual consent and agreement of the shareholders of the companies and that, in consideration for the agreement of the other and such course of dealing, they would continue to maintain, operate and conduct the business of both companies only for their mutual financial benefit. Both agreed that neither would commission, engage in, or conduct any business, policy or activity for the companies without the agreement of the other. [R. 7, ¶ 27, R. 10, ¶ 33]. At all times prior to Gary Ostler's death, both he and Dale Ostler served as the directors of the two companies. [R. 3, ¶ 12].

Prior to the death of Gary Ostler, all policies and practices for the operation of the companies, including the conduct of the business of each company and the making of net income distributions to the two shareholders, was formulated and implemented only and solely by Gary Ostler and Dale Ostler and with the consent of the other of them as the only shareholders of the companies. [R. 4, ¶ 21]. The business of the two companies was managed, operated and conducted in accordance with and pursuant to the agreement of Gary Ostler and Dale Ostler, and in accordance with their custom and usage. Gary Ostler, Dale Ostler, Vyron Ostler and the two companies all performed in accordance therewith. [R. 7, ¶ 27, R. 10, ¶ 33]. No policies, programs, business ventures or net income distributions of the companies were undertaken without the joint and mutual consent of Gary and Dale Ostler and all decisions and policies of both companies and of the board of directors of each company were contingent, conditional and based upon the mutual consent and approval of Gary and Dale Ostler as shareholders. [R. 4, ¶ 21]. It was the understanding, agreement and practice of each company's board of directors that the business and the affairs of that company should and would be undertaken and managed only in accordance with such mutual consent of the company's shareholders. [R. 4, ¶ 21].

Prior to Gary Ostler's death, Ostler International had historically distributed more than 80% of its net profits to Gary Ostler and to Dale Ostler as shareholders of the company. The distributions were made regularly and approximately quarterly, 50% to Gary Ostler and 50% to Dale Ostler. [R. 3, ¶ 15].

Mr. Stowell, as Personal Representative of the Gary Ostler Estate, is charged to and does hold all rights and interest held by Gary Ostler at the time of his death. This includes all right, title and interest of Gary Ostler in and to the shares of capital stock of both companies as were owned and held by Gary Ostler at his death. Mr. Stowell holds, for and in behalf of the creditors and beneficiaries of the Gary Ostler Estate, such ownership, title and interest in trust as successor in interest to Gary Ostler. [R. 5, ¶ 23].

Mr. Stowell made demand that Dale Ostler and the two Defendant companies recognize Mr. Stowell as entitled to and holding the same right and interest held by Gary Ostler. This includes the rights and interest formulated and implemented by Gary Ostler and Dale Ostler pursuant to their past custom, usage and course of dealing and as was recognized by the directors and officers of the two companies. Mr. Stowell has demanded that the business of the two companies be conducted only in accordance with the past custom, usage and course of dealing between Gary Ostler and Dale Ostler, and that no new policy of either company be adopted or pursued, or business conducted without, the mutual consent of Mr. Stowell and Dale Ostler. [R. 5, ¶ 24].

Dale Ostler, Vyron Ostler and the companies have not recognized and have not performed in accordance with the custom, usage and course of dealing formulated and implemented between Gary Ostler and Dale Ostler. They have failed and refused to permit Mr. Stowell's involvement in the determination and implementation of policy and the conduct of the business of the companies. They have also failed and refused to require that company policy be formulated and implemented only with the mutual consent of Mr. Stowell and Dale Ostler. In particular, Dale Ostler, Vyron Ostler, and the companies:

(a) Have adopted and implemented policies to which Mr. Stowell is not in agreement.

(b) Prior to this lawsuit, failed to call and conduct a meeting of the shareholders to afford Mr. Stowell, as a shareholder of each company, his right to vote the shares of capital stock of the companies.

(c) Have nominated, appointed or elected one or more members of the board of directors of the companies without prior notice to, consulting with, or obtaining the agreement of, Mr. Stowell.

(d) Intend to issue additional shares of capital stock of the companies to one or more of the Defendants and to third parties. This is allegedly and purportedly in compensation for services rendered or to be rendered by such persons to the companies. The issuance of such shares will compromise and impair the value of the shares held by Mr. Stowell and the value of his interest in each company.

(e) Intend to retain in the companies the preponderant part of all net earnings of the company, and to disburse only a nominal portion of the amount to which the Gary Ostler Estate is entitled.

(f) Have failed and refused to make regular distributions of net income of the two companies as historically made and as agreed between Gary Ostler and Dale Ostler and, in particular, have refused to make such distributions to which the Gary Ostler Estate is entitled.

[R. 6, ¶ 25]. Dale Ostler and the other Defendants have in such particulars breached their agreement with Gary Ostler and with Mr. Stowell and additionally, have breached their agreement in refusing to obtain the approval and consent of Mr. Stowell regarding the adoption and implementation of policy and business practices of the companies. [R. 8, ¶¶ 29-30, R. 11, ¶¶ 35-36].

SUMMARY OF ARGUMENTS

The trial court erred in determining that because the Gary and Dale Ostler shareholder agreements were verbal rather than written and because they did not specifically provide for a term in excess of ten years, the agreements were invalidated by Utah Code Ann. § 16-10a-732. The Section does not specifically provide that a shareholder agreement is unenforceable if not in writing. The failure to so specifically provide, renders the Section ambiguous, wherefore the Court should look to the Official Commentary to the Utah Revised Business Corporation Act to determine the Utah Legislature's intent in light of the purpose the Statute was meant to achieve. The Official Commentary is both endorsed and the publication thereof directed by the Utah Legislature. It provides that there should be no negative inference that a shareholder agreement that might be embraced by the statute is ipso facto, invalid unless it complies with the statute. The Utah Legislature does not intend that shareholder agreements be automatically invalidated because either not written or having a term in excess of ten years without specifically so providing.

The Gary and Dale Ostler shareholder agreements and their terms and performance are admitted both for the purposes of the motions determined by the trial court and for this appeal. The agreements were partially performed by Gary Ostler and by Dale Ostler and their enforceability depends upon their terms, contractual formalities and the partial performance of Gary and Dale Ostler.

The subject shareholder agreements were not personal services contracts that were extinguished upon the death of Gary Ostler. Neither party agreed to provide a service to the other, nor did either agree to provide a specific service to Ostler International or to Ostler Property Development. They were contracts of persuasion having as their purpose to assure unanimity in the decisions which Gary Ostler and Dale Ostler made regarding the companies. They were necessary because the capital stock of the companies was owned 50% by Gary Ostler and 50% by Dale Ostler. Gary Ostler's rights and interests in the shareholder agreements are held and vested in the Gary Ostler decedent estate and in Mr. Stowell as Personal Representative of the estate.

ARGUMENT

The preeminent issue is whether Utah Code Ann. § 16-10a-732 ("Section 732") voids all verbal shareholder agreements. The Section is Section 732 of the Utah Revised Business Corporation Act ("Revised Act") which was enacted in 1992 by Substitute Utah House Bill No. 50. By the Bill, the Utah Legislature also endorsed and directed the publication of the Official Commentary to Utah Revised Business Corporation Act ("Official Commentary") as a companion to the Revised Act and in part as an aid in its understanding and interpretation. The Utah Division of Corporations and Commercial

Code is charged with the publication of the Official Commentary and the same is published in the Utah Corporation and Business Law Manual.

This Court has not previously determined the application of Utah Code Ann. § 16-10a-732. It has never addressed the application of Section 732 of the Revised Act. It has never addressed the application of the Official Commentary to the Revised Act. It has never ruled as the trial court has determined, that an agreement among all shareholders of a closely-held corporation expressing their mutual intent and consent regarding the business policy and practice of the corporation and upon which they have mutually relied and depended and which they have consensually performed over a period of years, is because not reduced to writing, void ab initio and unenforceable. There is no case authority in Utah or elsewhere addressing the application of Section 732, or the application of the Official Commentary to the Section.

A. UTAH CODE ANN. § 16-10a-732 DOES NOT VOID ALL VERBAL SHAREHOLDER AGREEMENTS.

Utah Code Ann. § 16-10a-1701 makes the Revised Act applicable to domestic corporations in existence on July 1, 1992. However, Gary Ostler and Dale Ostler had incorporated Ostler International in January 1988, almost four and one-half years earlier and consequently, and by the operative date of Section 732, were already engaged in performances under their verbal shareholder agreement. They incorporated Ostler Property Development in July of 1993. By then, the Revised Act was in place.

Notwithstanding, it is obvious that being more than four years into their verbal agreement regarding Ostler International, they determined to implement the same arrangement and circumstance with regard to Ostler Property Development, that being that they would also utilize a verbal shareholders agreement regarding the new company.

The trial court held that because the Gary Ostler and Dale Ostler shareholder agreements were verbal they were, by that circumstance, invalidated by § 16-10a-732. [R. 323].

No where, does the Section state that a verbal shareholder agreement is void. At paragraph 1 it provides that "an agreement among the shareholders of a corporation that complies with this section is effective among the shareholders and the corporation even though it is inconsistent with one or more other provisions of this chapter." Utah Code Ann. § 16-10a-732(1). Paragraph 2 then provides that such agreement is to be written. In other words, the Section makes effective or validates a written shareholder agreement, although otherwise inconsistent with the Revised Act. However, it does not declare that verbal shareholder agreements are void. It validates all written shareholder agreements that fall within the contemplation of paragraph 1 and also accord with paragraph 2. Consequently, agreements which are verbal and otherwise do not comply with paragraph 2 are not validated by Section 732, but rather their validity depends upon their terms and other contractual formalities and the performance of the shareholders in response thereto.

B. UTAH CODE ANN. § 16-10a-732 IS NOT ANALOGOUS TO A STATUTE OF FRAUDS.

If this Court affirms the trial court's ruling that Section 732 voids all verbal shareholder agreements, such will raise the Section to the status of a "super" statute of frauds.

Certain verbal agreements are declared by statute to be unenforceable. Utah Code Ann. § 70A-1-206 so provides regarding certain contracts for the sale of personal property. Certain other verbal agreements are by the Utah Statute of Frauds, Title 25, Chapter 5, Utah Code Ann., made unenforceable. However, in each of these instances the statute specifically declares that if the contract is not written it is not enforceable. Additionally, the Statute of Frauds specifically provides at Utah Code Ann. § 25-5-8 for the specific performance of otherwise invalid agreements if the same have been partially performed. Section 732 does not state that verbal shareholder agreements are void. It provides no opportunity for the specific performance of those as are partially performed. If Section 732 voids verbal shareholder agreements without specifically so declaring it becomes a statute of frauds without peer. What is abundantly clear from the Official Commentary is that Section 732 was not intended to be a statute of frauds or anything analogous thereto.

C. UTAH CODE ANN. § 16-10a-732 IS AMBIGUOUS. THE COURT SHOULD LOOK TO THE OFFICIAL COMMENTARY TO GLEAN LEGISLATIVE INTENT.

Section 732 is clear in its declaration that the shareholder agreements validated by the Section are to be in writing. It does not speak to verbal agreements long acknowledged, adhered to and performed by shareholders and under which substantial rights as well as obligations of performance have been established and acknowledged. The Section does not state that such are void. Invalidation is punitive! Consequently, such verbal agreements must be permitted and required to stand on their own, finding no validation under Section 732, but their efficacy to be established by measuring them against traditional legal principals. The failure of the Section to specifically declare verbal agreements to be invalid makes the language of the statute insufficient and therefore, ambiguous. With the plain language being insufficient to permit a determination of the issue, this Court looks to give effect to the Utah Legislature's intent in light of the purpose the statute was meant to achieve. *In re Kunz*, 2004 UT 71, 99 P.3d 793; *Foutz v. City of South Jordan*, 2004 UT 75, ¶11, 100 P.3d 1171. To do so, it looks to the official comments of the legislative drafters of the Statute. *Case v. Case*, 2004 UT App 423, ¶ 13, 103 P.3d 171. Therefore, the Court should look to the Official Commentary.

When official comments to a statute have been adopted by the Utah Legislature they are authoritative as to the interpretation of the statute. See *Simplot Company v. Sales King International, Inc.*, 2000 UT 92, ¶40, 17 P.3d 1100. As directed at Section 732, the Official Commentary, in pertinent part, provides:

Shareholders of closely-held corporation, ranging from family business to joint ventures owned by large public corporations, frequently enter into agreements that govern the operation of the enterprise. In the past, various types of shareholder agreements were invalidated by courts for a variety of reasons, including so called "sterilization" of the board of directors and failure to follow the statutory norms of the applicable corporation act. *The more modern decisions reflect a greater willingness to uphold shareholder agreements*. (Internal citation omitted)

. . . [S]ection 732, which was added to the Model Act in 1991, rejects the older line of cases. It adds an important element of predictability previously absent from the Model Act and affords participants in closely-held corporations greater contractual freedom to tailor the rules of their enterprise. The drafters have elected to add section 732 of the Model Act to the Revised Act.

Section 732 is not intended to establish or legitimize an alternative form of corporation. Instead, it is intended to add, within the context of the traditional corporate structure, legal certainty to shareholder agreements that embody various aspects of the business arrangement established by the shareholders to meet their business and personal needs. The subject matter of these arrangements includes governance of the entity, allocation of the economic return for the business, and other aspects of the relationships among shareholders, directors and the corporation which are part of the business arrangement. Section 732 also recognizes that many of the corporate norms contained in the Model Act (and Revised Act), as well as the corporation statutes of most states, were designed with an eye towards public companies, where management and share ownership are quite distinct. These functions are often conjoined in the close corporation. Thus, section 732 validates for nonpublic corporations various types of agreements among shareholders even when the agreements are inconsistent with the statutory norms contained in the Model Act and Revised Act. (Internal citation omitted).

Importantly, section 732 only addresses the parties to the shareholder agreement, there transferees, and the corporation, and does not have any binding legal effect on the state, creditors, or other third persons.

Section 732 supplements the other provisions of the Model Act and Revised Act. If an agreement is not in conflict with another section of the

> Revised Act, no resort need be made to section 732, with its requirement of unanimity.
>
> The types of provisions validated by § 732 are many and varied. Section 732(1) defines the range of permissible subject matter for shareholder agreements largely by illustration, enumerating seven types of agreements that are expressly validated to the extent they would not be valid absent section 732. The enumeration of these types of agreements is not exclusive; *nor should it give rise to a negative inference that an agreement of a type that is or might be embraced by one of the categories of section 732(1) is, ipso facto, a type of agreement that is not valid unless it complies with section 732.* Section 732(1) also contain a "catch all" which adds a measure of flexibility to the seven enumerated categories.

(Emphasis added) Official Commentary, Page 338.

The Utah Legislature's recognition that Utah shareholders of closely-held corporations frequently enter into agreements that govern the operation of the corporation and the Legislature's determination that Section 732 affords the shareholders greater contractual freedom to tailor the rules of their enterprise, is of no small import to the final determination of the issues here presented. Section 732 is the Legislature's acknowledgment of the need to recognize and accept such agreements.

Mr. Stowell and the Defendants are in agreement that the Gary and Dale Ostler shareholder agreements conflict with a number of the sections of the Revised Act. In other words, pursuant to each shareholder agreement it was agreed that all policies and practices for the operation of the company, including the conduct of the business of the company and the making of net income distributions to Gary Ostler and Dale Ostler, is formulated and implemented only and solely by them and with the consent of the other of them as being the only shareholders of the company. No policies, programs, business ventures or net income distribution of the company was undertaken without their joint and usual consent and all decisions and policies of the company was contingent, conditional and based upon the mutual consent and approval of Gary Ostler and Dale Ostler. Both shareholders agreed that neither would commission or engage in or conduct any business policy or activity for the company without the agreement of the other. Both agreed that in consideration for the agreement of the other and such course of dealing, that they would continue to maintain, operate and conduct the business of the company only for their mutual financial benefit.

It was obvious to both the Ostler brothers, that as each owned fifty percent of the shares of the capital stock, the operation and business of the two companies would be hamstrung without their mutual consent and agreement. Gary and Dale Ostler had so agreed and operated since the incorporation of each of the two companies. Their agreements were verbal and each performed in accordance therewith continually and until the death of Gary Ostler on July 13, 2003.

The trial court accepted the existence of the shareholder agreements and their performance by both Gary and Dale Ostler prior to Gary Ostler's death. [R. 320-321]. It ruled that notwithstanding such performance, Utah Code Ann. §16-10a-732 invalidated the agreements because they were verbal and because the parties had intended, but had not specifically provided for a term in excess of ten years. [R. 322-323, 325]. It held that the agreements always had been and now remain unenforceable. [R.322, 323, 325]. Although the existence and application of the Official Commentary was briefed and argued to the trial court, the court neither commented upon nor made reference to the Commentary. It determined that the language of Section 732 was plain and unambiguous and that it invalidated the agreements.

Because the subject shareholder agreements are inconsistent with one or more sections of the Revised Act, they specifically fall within the contemplation of Section 732(1). They are the kind of agreements that are addressed by that Section. Again, the Official Commentary provides "[i]f an agreement is not in conflict with another section of the Revised Act, no resort need be made to section 732, with its requirement of unanimity." Utah Corporation and Business Law Manual at 338. Clearly, the terms of the shareholder agreements, bring them within the contemplation of the Section. However, because these shareholder agreements are not written and because they do not express the intention of Gary and Dale Ostler that their term extend beyond ten years, the agreements do not find validation in the Section. Enforceability is necessarily separate and apart from the Section and is based upon the terms of the contracts and the part performance of Gary Ostler and Dale Ostler.

D. <u>THE UTAH LEGISLATURE DOES NOT INTEND THAT SECTION 732 VOID VERBAL SHAREHOLDER AGREEMENTS</u>.

The Official Commentary demonstrates that it was not the design and intention of the Utah Legislature that Section 732 be the basis of invalidating a shareholder agreement standing independent of the Section and with an established history of reliance upon and performance by the parties. Again, the Commentary recites:

> The enumeration of these types of agreements is not exclusive; *nor should it give rise to a negative inference that an agreement of a type that is or might be embraced by one of the categories of section 732(1) is ipso facto, a type of agreement that is not valid unless it complies with section 732.*

(Emphasis added) Utah Corporation Business Law Manual, P. 338.

The predominant purpose of Section 732 is to acknowledge and validate shareholder agreements that conflict in one particular or another with other sections of the Revised Act. Such acknowledges that such conflicting agreements have traditionally existed, are of importance to the business purposes of the parties thereto and that it is important to sanction the existence and enforceability of the same. If such agreements did not exist, there would be no purpose for Section 732. It is the inconsistency with other provisions of the Revised Act which brings a shareholder agreement within the purview of Section 732. No where, however, does the section say that an agreement, which falls within the parameters of the section, but is not in writing, is thereby automatically void. Rather, the verbal shareholder agreement is what it is and if enforceable as a consequence of the particular terms, rights and duties therein agreed and the performance made in response thereto, then while it is acknowledged by Section 732, it does not find its validity within the Section. The Section does not give it any additional force or effect, but the agreement must stand or fall on its own.

Obviously, the Official Commentary and the legislature's endorsing of the same, contemplate that there are certain circumstances under which it should not be required that a particular shareholder agreement meet and comply with the provisions of Section 732 as a prerequisite to validity. If the agreement is otherwise valid, then it remains so. The Utah Legislature is making it clear that it did not wish to impose additional statutory requirements on a shareholder agreement that was enforceable in its own right and separate from Section 732.

E. <u>THE TRIAL COURT ERRED IN DETERMINING THAT THE SHAREHOLDER AGREEMENTS EXPIRED TEN YEARS FROM THE DATE THEREOF</u>.

Clearly the verbal shareholder agreements did not have any fixed term of years and therefore do extend beyond ten years. Obviously, Gary Ostler and Dale Ostler intended and agreed that they would so continue. Once again, the trial court applied Utah Code Ann. § 16-10a-732(2) wherein it is provided that shareholder agreements are "valid for ten years, unless the agreement provides otherwise". The court held:

> Furthermore, Plaintiff's argument to the contrary notwithstanding, unless the agreement provides specifically for the agreement to endure beyond ten years, it falls within the default operation of Subsection 2(c), which is that it "shall be . . . valid for ten years." Because the corporations were formed in 1988 and 1993, any agreement ceased to be enforceable no later than July 2003, which, coincidentally, was about the time of Gary's death. If the passage of the Act is considered the relevant time, the

> agreement ceased to be effective in 1992. Accordingly, the agreement, even if it had been in writing and thus enforceable, would no longer have been in force after Gary's death unless it had provided for a period in excess of ten years. Thus, no action may be maintained on the contract . . . .

[R. 322-323].

In so holding, the trial court made two determinations, one legal and the other factual. First it determined that the agreements necessarily fell within Section 732 and consequently, were subject to the ten year limitation. Then it made a factual determination that the Gary and Dale Ostler agreements had not provided for a period in excess of ten years. The Court erred because, as above discussed, the validity and enforceability of the shareholder agreements is not dependent upon the application of Section 732. Additionally, however, there is no factual basis on which the court could find that those agreements did not provide for a period in excess of ten years.

Clearly, Mr. Stowell's Complaint, the allegations of which are admitted for purposes of this appeal, did not allege any particular term or termination date for the shareholder agreements. Rather, the term was necessarily for as long as Gary Ostler and Dale Ostler each owned 50% of the shares of the two companies. It was not possible to know how long or short of time that might be. Notwithstanding, their purpose to continue that ownership for more ten years thereby similarly extended the operative time of their agreements. The Complaint specifically alleges:

> . . . [I]t was the agreement of Decedent and Dale Ostler . . . that all policy of the company would be adopted and implemented and the company

> managed, operated and its business conducted only upon and pursuant to the mutual consent and agreement of the company's shareholders. Both Decedent and Dale Ostler agreed that in consideration for such agreement of the other and such course of dealing, that they would continue to maintain, operate and conduct the business of [the company] only for their mutual financial benefit and that neither would commission, engage in or conduct any business policy or activity which the other did not agree.

[R. 7, ¶ 27, R. 10, ¶ 33].

> . . . Decedent and Dale Ostler further agreed that except upon their mutual consent and agreement as shareholders of [the company], that shares of the capital stock of the company would neither be offered nor provided to any other person.

[R. 8, ¶28, R. 11, ¶ 34].

Section 732 does not void the shareholder agreements. Further, there was no factual basis on which the trial court could properly conclude that Gary Ostler and Dale Ostler had not agreed that the term of their agreements would extend for so long as each owned 50% of the capital shares of the companies both intending and understanding that term may well extend in excess of ten years.

F. THE SHAREHOLDER AGREEMENTS WERE NOT PERSONAL SERVICES CONTRACTS THAT EXTINGUISHED UPON GARY OSTLER'S DEATH.

The trial court determined that the shareholder agreements were intended by Gary Ostler and Dale Ostler to benefit only themselves and consequently were personal agreements that perished upon Gary Ostler's death thereby terminating all rights and obligations thereunder. [R. 323-324].

The court's ruling was in response to Defendants' argument that the shareholder agreements were personal services agreements and therefore, that neither Gary Ostler nor Dale Ostler had the right to assign their interest therein to a third party and that their respective interests were not inheritable at death. Defendants, Dale Ostler and Vyron Ostler, citing this Court in *Clark v. Shelton*, 584 P.2d 875, (Utah 1998), had erroneously argued that "[c]learly, 'the personal needs, characteristics of personality of [Dale Ostler and Gary Ostler] are dominant factors and the reason for [the Alleged Oral Shareholder Agreements].'" [R. 233]. They asserted that rights under such personal services contracts could not have been inherited and consequently that neither the Gary Ostler Estate or any of Gary Ostler's heirs have any legal right under the agreements. The fact of the matter is that the shareholder agreements which stand admitted before the Court were not personal services contracts.

This Court has defined a personal services agreement as "a contract which is personal in nature, where the personal needs, characteristics or personality of the obligee are dominant factors in the reason for contracting. . . ." *Clark*, 584 P.2d at 877. In the Gary and Dale Ostler agreements, neither party agreed to provide a service to the other, nor did either agree to provide a specific service to the companies. Mr. Stowell's Complaint does not allege otherwise. The purpose of their agreements was to assure unanimity in their decisions regarding the companies. Theirs was a contract of persuasion. They equally shared ownership in the companies and had so arranged so that neither of them would have the power to make any decision or take any action without first persuading the other that the decision or action was correct. They thereby intended to benefit their respective shareholder positions. Had they intended one to have more right or authority than the other or to be able to act unilaterally, then they would have allocated shares differently than fifty-fifty. Their share allocation was meant to compel unanimity in their decisions and policies for the companies.

It was the circumstances dictated by equal stock ownership and not the personal needs or personalities of Gary and Dale Ostler that were the reason and motivation for their shareholder agreements. The focus was not on who they were, but the percentage of shares each held. Mr. Stowell's Complaint, in relevant part, alleges:

> All *policy and practices* . . . was formulated and implemented only and solely by Decedent and Dale Ostler as the only shareholders . . . . No company policies, programs, business ventures or net income distributions were undertaken without their joint and mutual consent. All *decisions and policies* . . . were contingent, conditional and based upon the *mutual consent and approval of said shareholders*.

[R. 4, ¶ 21].

> [It] was the agreement . . . that all policy of the company would be adopted and implemented and the company managed, operated and its business conducted *only upon and pursuant to the mutual consent and agreement* of the company's shareholders.

(Emphasis added) [R. 7, ¶ 27, R. 10, ¶ 33].

Gary and Dale Ostler agreed that all policies and practices for the operation of the two companies were to have been formulated and implemented by them, which is to say with their mutual consent and agreement. Once those policies and business practices were in place then the companies were to operate in accordance therewith with officers and employees performing their responsibilities in accordance with those policies. Their agreements did not mandate a personal involvement in all day-to-day management decisions. Mr. Stowell's Complaint does not allege otherwise. Rather, the personal involvement was in the formulation and adoption of the policies and business practices of each company. The personal needs and characteristics of Gary Ostler and of Dale Ostler were not relevant to their agreements. Rather, each was dependent upon and subject to their necessary agreement of persuasion. They each owned an equal ownership interest, each was dependent upon the consent of the other, but not on any management skill, personality characteristics or financial means. It is abundantly obvious that when their agreements originated, they reflected an intent and purpose of complete mutuality and the reasonable assurance that the businesses would be correctly operated as a consequence of their deliberations and the ability and commitment of each to be persuaded and to proceed by mutual agreement.

The percentage of shares held by the one shareholder did not permit policy and business practices of the companies to be adopted without participation of the other. Consequently Gary Ostler and Dale Ostler intended that except upon their mutual consent and agreement, shares of the capital stock of the companies would not be offered or provided to any other person. [R. 5, ¶ 22]. Notwithstanding, it was necessarily contemplated that the death of either would cause his shares to pass to his decedent estate and thereafter to his heirs. Gary Ostler's decedent estate and the rights and responsibilities statutorily granted and imposed on Mr. Stowell as personal representative creates no foreseeable issues with regard to the performance of the shareholder agreements during the ongoing probate of the estate. The shareholders agreements remain contracts of persuasion for the benefit of the current shareholders, to wit: Dale Ostler and Mr. Stowell as personal representative of the Gary Ostler estate.

CONCLUSION

Utah Code Ann. § 16-10a-732 does not by its terms either validate or void the Gary Ostler and Dale Ostler verbal shareholder agreements. That ambiguity prompts the Court to look to the Official Commentary which declares the intention of the Utah Legislature that such agreements are to be recognized. The enforceability of the subject shareholder agreements is dependent upon requirements of contract law and the partial performance by the parties to the agreements. The agreements are partially performed and valid. The shareholder agreements do not constitute personal services contracts between Gary Ostler and Dale Ostler. Douglas Stowell, as Personal Representative of the Gary Ostler estate, respectfully requests that the trial court's June 8, 2005 Ruling and Order be reversed, that Mr. Stowell's claims be reinstated and the case remanded for purposes of trial.

DATED this 21st day of October, 2005.

NIELSEN & SENIOR

Gary A. Weston
Attorneys for Plaintiff/Appellant,
Douglas L. Stowell, Personal
Representative of the Estate of
Gary W. Ostler, Deceased

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of October, 2005, I did cause two true and correct copies of the foregoing BRIEF OF APPELLANT to be hand delivered, addressed to the following:

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FILED DISTRICT COURT
Third Judicial District

JUN 09 2005

SALT LAKE COUNTY

By ______ Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

DOUGLAS L. STOWELL, et al.	:	**RULING AND ORDER**
Plaintiff,	:	**CASE NO. 040926555**
vs.	:	
		June 8, 2005
OSTLER INTERNATIONAL, et al.	:	
Defendant.	:	

The above matter came before the Court on June 6, 2005 for oral argument on Defendants' motions to dismiss, Plaintiff's Motion to Postpone Decision, and the Ostler Defendants' Motion to Strike, pursuant to Rule 7. Plaintiff was present through Gary A. Weston, the Ostlers were present through Mark A. Larsen, and Ostler International and Ostler Property Development ("the corporations") were present through Steven G. Loosle.

The corporations' Motion to Dismiss, with accompanying memorandum, was filed on January 20, 2005. On January 24, 2005, the Ostlers filed their Motion to Dismiss with an accompanying memorandum and an affidavit. Plaintiff filed his opposition to the corporations' motion on February 15, 2005, and independently filed his opposition to the Ostlers' motion on February 22, 2005. On the same date, Plaintiff filed his Motion to Postpone Decision on the Ostler Motion to Dismiss, with accompanying affidavit. The Ostlers filed their reply in support of their motion to dismiss on February 28, 2005. On March 3, 2005, the Ostlers filed both their opposition to Plaintiff's motion to postpone and their motion to strike, with accompanying memorandum, and the corporations' reply in support of their motion was also filed on March 3, 2005. Plaintiff's reply in support of his motion to postpone was filed on March 10, 2005 and his opposition to the Ostlers' motion to strike followed on March 17, 2005. The Ostlers filed their reply in support of their motion to strike on March 24, 2005. These motions were submitted for decision on March 29, 2005.

The court scheduled and heard oral argument and took the matter under advisement. Having considered the case file, the motion and the memoranda submitted by the parties, and the arguments made in open court, the Court enters the following decision.

BACKGROUND

Plaintiff Douglas Stowell is the Personal Representative of the Estate of Gary W. Ostler, who, at the time of his death in July 2003, was 50% shareholder in Defendants Ostler International Inc., and Ostler Property Development, Inc., both of which are closely held corporations. At the time Gary Ostler died his brother Defendant Dale Ostler held the other 50% of the shares in both corporations. Both brothers, without the benefit of bylaws or any provisions in the articles of incorporation, and apparently by oral agreement, served as the board of directors and shared equal decision-making authority for both companies. Shortly after Gary's death, Dale Ostler appointed himself and another brother, Defendant Vyron Ostler, as the new Board of Directors in both companies.

Plaintiff brought this action on behalf of the Estate of Gary Ostler to seek to require the parties to continue to operate under the oral agreement under which the parties operated prior to Gary's death, and specifically to require and enjoin Defendants from taking any action without the consent of Plaintiff, including, but not limited to, appointing a new board of directors.

DISCUSSION

Treatment of Ostlers' Motion as Motion for Summary Judgment

The crux of the arguments in favor of dismissal of this action lies in the simple proposition that because the alleged agreement between Gary and Dale Ostler was not in writing, it cannot be enforced. The affidavit of Dale Ostler, while it may be useful for determining what the terms of such agreement were, is not helpful in determining the legal question of whether any such oral agreement can be enforced under either the Utah Revised Business Corporations Act, or under its predecessor, the Utah Business Corporations Act.

In the court's view, this is a purely legal consideration, and the facts upon which such a legal determination may be made are contained entirely in the Complaint filed in this matter. Accordingly, because the court does not rely upon the Affidavit of Dale Ostler in reaching its decision, the court hereby excludes such, and determines this matter under Rule 12(b)(6) as the substantive motions filed herein invite.

Consequently, Plaintiff's motion to postpone and the Ostlers' motion to strike, inasmuch as these motions were relevant only if the Ostler Motion was considered as a motion filed under Rule 56, are hereby DENIED as moot.

Defendants' Motions to Dismiss

Because the court considers the present motions as they were presented, and excludes all matters outside the pleading, it is appropriate that the court consider the facts as alleged to be true, indulging all reasonable inferences consistent with the allegations of the complaint.

Enforceability of the Oral Agreement

Plaintiff's nine causes of action seek enforcement of the oral agreement under contract and equitable theories, and those theories include breach of contract (first and second causes of action), constructive trust (third), unjust enrichment (fourth), breach of fiduciary duty (fifth), promissory estoppel (sixth). The complaint also seek declaratory and injunctive relief and an accounting (seventh-ninth causes of action). At the heart of all of these causes of action are duties which arose as a result of an oral agreement between Dale Ostler and Gary Ostler. While the court assumes the existence of an agreement between the two brothers, the question arises whether the agreement is still in force, which may be determined upon facts as alleged in the complaint.

Applicability of U.C.A. § 16-10A-732

For purposes of this motion, the court accepts Plaintiff's argument that while there were two separate corporations formed, the agreement under which both corporations were managed predates those incorporations, and also predates the Utah Revised Business Corporations Act. However, the act specifically applies itself to those corporations which were in existence at the time it was enacted, as well as those formed afterward, in an attempt to ensure the uniform application of the law to all corporations then in existence. See Utah Code Ann. § 16-10A-1701. Plaintiff has not submitted to the court any basis for application of the saving provisions established under § 1704, which provides a limited basis for the enforcement of the previous act, except for the existence of the agreement prior to enactment of the revised act. Accordingly, the court applies the provisions of the Utah Revised Business Corporations Act to the agreement.

Restriction on Operational Agreements Outside of the Act

Section 732(2) of the act provides:

> (2) An agreement authorized by this section [i.e. one which takes operation of the company outside the act] shall be:
>
> (a) set forth:
>
> (I) in the articles of incorporation or bylaws and approved by all persons who are shareholders at the time of the agreement; or
>
> (ii) in a written agreement that is signed by all persons who are shareholders at the time of the agreement and is made known to the corporation; . . .
>
> ©) valid for 10 years, unless the agreement provides otherwise.

Utah Code Ann. § 16-10A-732(2). The words "shall be" constitute mandatory language—in other words, operation within this provision is limited to only those circumstances specified in the provision. Those circumstances are that an agreement formed which allows a corporation to operate outside of the requirements of the Act, "shall be set forth" in the articles of incorporation or bylaws, or in a written agreement. Under both methods, the agreement must be approved by all shareholders.

Furthermore, Plaintiff's argument to the contrary notwithstanding, unless the agreement provides specifically for the agreement to endure beyond ten years, it falls within the default operation of subsection 2©), which is that it "shall be . . . valid for 10 years." Because the corporations were formed in 1988 and

1993, any agreement ceased to be enforceable no later than July 2003, which, coincidentally, was about the time of Gary's death. If the passage of the Act is considered as the relevant time, the agreement ceased to be effective in 1992. Accordingly, the agreement, even if it had been in writing and thus enforceable, would no longer have been in force after Gary's death unless it had provided for a period in excess of ten years. Thus, no action may be maintained on the contract and the Plaintiff's first and second causes of action must be dismissed.

Plaintiff argues that section 732 does not label as "invalid" an agreement that is not in writing. The court disagrees as to the legal effect of the words "shall" be in writing. The court believes that if not in writing, an agreement meant to allow a diversion from the requirements of the Act must be in writing or it is not enforceable.

Equitable Treatment of the Agreement

Notwithstanding the failure of the agreement to survive until the present action accrued, the question remains whether the promises made to Gary Ostler might create an equitable obligation upon Dale Ostler and the corporations which inured to the benefit of Gary's estate. The difficulty with this is that there is no allegation in the complaint from which the court may conclude that the operation of the agreement was intended to benefit any other persons than Gary and Dale Ostler. Throughout the complaint are statements regarding the intent of Gary and Dale Ostler on how the profits were to be divided and how decisions were to be made and how stock ownership was to be divided, but these only serve to underscore the assumption that those arrangements were made for the benefit of Gary and Dale personally. From the informality of the agreement it may clearly be assumed that these two individuals believed that they did not need to have any formal agreement or document detailing how to run the companies precisely because of the personalities involved. Dale apparently knew he could trust Gary, and vice versa. When Gary died, the value of such an informal arrangement to Dale perished with Gary. In light of these circumstances, it would not be equitable to tie the remaining member of the corporations to Gary's estate, and force him to conduct business as if nothing had happened, especially when there is absolutely no allegation that the parties established this business for anything more than their own personal benefit. The court accordingly concludes that this was a personal agreement between Gary and Dale Ostler. The obligations of Dale Ostler to continue conducting business as had been agreed in years previous was an obligation to Gary alone and ended when Gary died, just as surely as Gary's obligations to Dale cannot be enforced beyond the grave.

CONCLUSION

Because the agreements between Dale and Gary Ostler were not enforceable as a matter of contract law under the Utah Revised Business Corporation Act, and because they were personal agreements not enforceable under principles of equity, Defendants Motions to Dismiss are hereby GRANTED.

This Ruling and Order is the Order of the Court, and no other order is required.

DATED this 8 day of June, 2005.

Judge Bruce Lubeck
District Court Judge

THIRD DISTRICT COURT SALT LAKE CITY
STATE OF UTAH

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IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

DOUGLAS L. STOWELL, PERSONAL REPRESENTATIVE OF THE ESTATE OF GARY W OSTLER, deceased, Plaintiff, vs. OSTLER INTERNATIONAL, INC , a Utah corporation; OSTLER PROPERTY DEVELOPMENT, INC , a Utah corporation, DALE OSTLER and VYRON OSTLER, Defendants	**COMPLAINT** Civil No 040926555 Judge Bruce Lubeck (Jury Demanded)

Plaintiff, Douglas L. Stowell, as Personal Representative of the Estate of Gary W. Ostler, deceased, hereby demands trial by jury and complains as follows and against the Defendants Ostler International, Inc , Ostler Property Development, Inc., Dale Ostler and Vyron Ostler.

PARTIES, JURISDICTION AND VENUE

1 Plaintiff, Douglas L Stowell, is Personal Representative of the Estate of Gary Ostler, deceased, having been so appointed by this Court on September 17, 2003, in Probate Case No 033901263 The decedent, Gary Ostler, ("Decedent") died on July 13, 2003

2 Decedent, and Defendants Dale Ostler and Vyron Ostler are brothers

3 Defendant, Ostler International, Inc ("Ostler International"), is a Utah corporation with its principal place of business in Salt Lake County, Utah

4 Defendant, Ostler Property Development, Inc ("Ostler Property Development"), is a Utah corporation with its principal place of business in Salt Lake County, Utah

5 Dale Ostler and Vyron Ostler are Directors of Ostler International and of Ostler Property Development and are officers of Ostler Property Development Vyron Ostler is an officer of Ostler International

6. This Court has jurisdiction over the claims set forth herein pursuant to § 78-3-4(1), Utah Code Annotated

7 The herein causes of action arise in Salt Lake County, Utah and one or more of the Defendants resides or maintains a principal place of business in Salt Lake County, Utah, wherefore, venue properly lies in this County pursuant to § 78-13-7, Utah Code Annotated.

GENERAL ALLEGATIONS

8 Decedent and Dale Ostler incorporated Ostler International about January 13, 1988 with each issued and holding 50% of all shares of capital stock of the company Each intended

and represented to the other of them that each would own and control one-half of the equity interest of the company

9 Decedent and Dale Ostler incorporated Ostler Property Development about July 14, 1993, with each issued and holding 50% of all shares of capital stock of the company Each intended and represented to the other of them that each would own and control one-half of the equity interest of the company

10 Until Decedent's death, all shares of capital stock of Ostler International and of Ostler Property Development issued and outstanding were held 50% by Decedent and 50% by Dale Ostler

11 Since Decedent's death, all issued and outstanding shares of capital stock of Ostler International and of Ostler Property Development have been held 50% by Dale Ostler and 50% by Decedent's estate

12. At all times prior to Decedent's death, Decedent and Dale Ostler were and served as the Directors of Ostler International and of Ostler Property Development

13. On information and belief, Plaintiff alleges that on one or more brief occasions, prior to Decedent's death, and at the request of Decedent and of Dale Ostler, Vyron Ostler was a nominal and non-participating member of the Board of Directors of Ostler International.

14. On information and belief, Plaintiff alleges that on one or more brief occasions, prior to Decedent's death, and at the request of Decedent and of Dale Ostler, Vyron Ostler was a nominal and non-participating member of the Board of Directors of Ostler Property Development

15 Prior to Decedent's death, Ostler International had historically distributed more than 80% of its net profits to Decedent and Dale Ostler as shareholders of the company The

distributions were made regularly and approximately quarterly, 50% to Decedent and 50% to Dale Ostler.

16. Pursuant to the annual report filed by Ostler International with the Utah Department of Commerce on or about March 26, 1998, it was represented that Vyron Ostler had been removed as a Director of the company and that the company's Board of Directors consisted of two members. Further, the Annual Report which the company filed with Utah Department of Commerce on November 7, 2003 declared the directors of the company, to be Dale Ostler and Vyron Ostler.

17. Some time after Decedent's death, Dale Ostler appointed Vyron Ostler to be a member of the Board of Directors of Ostler International and of Ostler Property Development It was Dale Ostler's intention that he and Vyron Ostler constitute the Board of Directors of each company.

18. Vyron Ostler was not a shareholder of either Ostler International or of Ostler Property Development at any time prior to the death of the Decedent.

19. On information and belief, Plaintiff alleges that no bylaws for Ostler International have been enacted or adopted.

20 On information and belief, Plaintiff alleges that no bylaws for Ostler Property Development have been enacted or adopted.

21 All policy and practices for the operation of Ostler International and for the operation of Ostler Property Development, including the conduct of the business of each company and the making of net income distributions to shareholders of each company was formulated and implemented only and solely by Decedent and Dale Ostler as the only shareholders of each

company and with the consent of the other of them. No company policies, programs, business ventures or net income distributions were undertaken without their joint and mutual consent. All decisions and policies of both Ostler International and Ostler Property Development and of the Board of Directors of each company were contingent, conditional and based upon the mutual consent and approval of said shareholders. It was the understanding, agreement and practice of each company's board of directors and each member thereof that the business and affairs of the company should and would be undertaken and managed only in accordance with such mutual consent of the company's shareholders.

22. It was the intention, design and purpose of Decedent and of Dale Ostler that shares of the capital stock of Ostler International and of Ostler Property Development neither should nor would, except upon their mutual consent and agreement as shareholders, be offered or provided to any other person.

23. Pursuant to §§ 75-3-703, 75-3-708, 75-3-710 and 75-3-714, Utah Code Annotated Douglas L. Stowell as Personal Representative of the Decedent's Estate is charged to and does hold all rights and interests held by Decedent at the time of Decedent's death, including all right, title and interest of the Decedent in and to the shares of capital stock of both Ostler International and of Ostler Property Development owned and held by Decedent. Plaintiff holds such ownership, title and interest, in trust, as successor in interest to Decedent and for and in behalf of the creditors and beneficiaries of Decedent's estate.

24. Plaintiff has made demand or does hereby demand that Defendants recognize Plaintiff as entitled to and holding the same right and interest held by Decedent as formulated and implemented by Decedent and Dale Ostler pursuant to their past custom, usage and course of

dealing and as was recognized by the directors and officers of Ostler International and of Ostler Property Development. Plaintiff has demanded or does hereby demand that the business of Ostler International and of Ostler Property Development be conducted only in accordance with the past custom, usage and course of dealing between Decedent and Dale Ostler and that no new policy of either company be adopted or pursued or business conducted without the mutual consent of Plaintiff and Dale Ostler.

25. Defendants have not recognized and performed in accordance with the custom, usage and course of dealing formulated and implemented between Decedent and Dale Ostler They have failed and refused to permit Plaintiff's involvement in the determination and implementation of policy and the conduct of the business of Ostler International and of Ostler Property Development and have failed and refused to require that such policy be formulated and implemented only with the mutual consent of Plaintiff and Dale Ostler In particular the Defendants:

(a) Have adopted and implemented policies to which Plaintiff is not in agreement.

(b) Have failed to call and conduct a meeting of the Shareholders to afford Plaintiff his right to vote the shares of capital stock of Ostler International and of Ostler Property Development and which he holds as a shareholder of each company

(c) Have nominated, appointed or elected one or more members of the Board of Directors of Ostler International and of Ostler Property Development without prior notice to, consulting with and obtaining the agreement of Plaintiff

(d) Intend to issue additional shares of capital stock of Ostler International and of Ostler Property Development to one or more of the Defendants and to third parties allegedly and purportedly in compensation for services rendered or to be rendered by such persons to Ostler International and to Ostler Property Development The issuance of such shares will compromise and impair the value of the shares held by Plaintiff and the value of Plaintiff's interest in each company

(e) Intend to retain in Ostler International and in Ostler Property Development the preponderant part of all net earnings of the company and to disburse only a nominal portion of the amount to which Plaintiff is entitled

(f) Have failed and refused to make regular distributions of net income of Ostler International and of Ostler Property Development as historically made and as agreed between Decedent and Dale Ostler and in particular, have refused to make such distributions to which Plaintiff is entitled

FIRST CLAIM FOR RELIEF

(Breach of Contract - Dale Ostler, Vyron Ostler and Ostler International)

26 Plaintiff incorporates herein the allegations contained in paragraphs 1 through 25 above

27 Upon information and belief, Plaintiff alleges that it was the agreement of Decedent and Dale Ostler, Vyron Ostler and Ostler International and the custom, usage and course

of dealing of they and any other director and the officers of Ostler International, that all policy of the company would be adopted and implemented and the company managed, operated and its business conducted only upon and pursuant to the mutual consent and agreement of the company's shareholders Both Decedent and Dale Ostler agreed that in consideration for such agreement of the other and such course of dealing, that they would continue to maintain, operate and conduct the business of Ostler International only for their mutual financial benefit and that neither would commission, engage in or conduct any business policy or activity to which the other did not agree Prior to the death of Decedent, the business of the company was managed, operated and conducted in accordance with and pursuant to said agreement, custom and usage and Decedent, Dale Ostler, Vyron Ostler and Ostler International performed in accordance therewith

28 Upon information and belief, Plaintiff alleges that Decedent and Dale Ostler further agreed that except upon their mutual consent and agreement as shareholders of Ostler International, that shares of the capital stock of the company would neither be offered nor provided to any other person

29 Dale Ostler, Vyron Ostler and Ostler International have breached their agreement with Decedent and with Plaintiff in the particulars as set forth and pled in paragraphs 25(a) to and including 25(f)

30 These Defendants have further breached their agreement and their duty and obligation thereunder, to not adopt or implement or cause or permit Ostler International to adopt or implement any policy or business practice without the approval and consent of Plaintiff as successor in interest to Decedent's right and interest under the Agreement

31. As a consequence of the failure and refusal of these Defendants to recognize and continue to perform in accordance with their agreement, custom, usage and course of dealing with Decedent and their refusal to permit Plaintiff's involvement in the determination and implementation of policy and the conduct of the business of Ostler International, Plaintiff does not have an adequate remedy at law against these Defendants and, is entitled to an order of the Court requiring these Defendants to specifically perform in accordance with their agreement, custom, usage and course of dealing with the Decedent and in particular

(a) To adopt and implement policies and business practices of Ostler International only with the mutual consent of Plaintiff or his successor and Dale Ostler

(b) To forthwith call and conduct a meeting of the shareholders, with proper and timely notice to Plaintiff, and to there afford and permit Plaintiff his right to vote the shares of capital stock of Ostler International which he holds as a shareholder of the company

(c) To elect or appoint members of Ostler International's Board of Directors only upon proper and timely notice to Plaintiff or his successor, and the mutual consent of Plaintiff or his successor and Dale Ostler

(d) To not issue additional shares of capital stock of Ostler International without the mutual consent of Plaintiff or his successor and Dale Ostler

(e) To disburse all net earnings of Ostler International in accordance with the custom, course of dealing and agreement between Decedent and Dale

Ostler unless otherwise mutually agreed between Plaintiff or his successor and Dale Ostler

In the event that the failure of these Defendants to perform in accordance with their agreement, custom and course of dealing with Decedent causes damage to Plaintiff then in that event, Plaintiff is entitled to judgment against such Defendants for damages in an amount to be determined by the Court.

SECOND CLAIM FOR RELIEF

(Breach of Contract - Dale Ostler, Vyron Ostler and Ostler Property Development)

32. Plaintiff incorporates herein the allegations contained in paragraphs 1 through 25 above

33. Upon information and belief, Plaintiff alleges that it was the agreement of Decedent and Dale Ostler, Vyron Ostler and Ostler Property Development and the custom, usage and course of dealing of they and any other director and the officers of Ostler Property Development, that all policy of the company would be adopted and implemented and the company managed, operated and its business conducted only upon and pursuant to the mutual consent and agreement of the company's shareholders Both Decedent and Dale Ostler agreed that in consideration for such agreement of the other and such course of dealing, that they would continue to maintain, operate and conduct the business of Ostler Property Development only for their mutual financial benefit and that neither would commission, engage in or conduct any business policy or activity to which the other did not agree Prior to the death of Decedent, the business of the company was managed, operated and conducted in accordance with and pursuant

to said agreement, custom and usage and Decedent, Dale Ostler, Vyron Ostler and Ostler Property Development performed in accordance therewith

34 Upon information and belief, Plaintiff alleges that Decedent and Dale Ostler further agreed that except upon their mutual consent and agreement as a shareholder of Ostler Property Development, that shares of the capital stock of the company would neither be offered nor provided to any other person

35 Dale Ostler, Vyron Ostler and Ostler Property Development have breached their agreement with Decedent and with Plaintiff in the particulars as set forth and pled in paragraphs 25(a) to and including 25(f)

36 Those Defendants have further breached their agreement and their duty and obligation thereunder, to not adopt or implement or cause or permit Ostler Property Development to adopt or implement any policy or business practice without the approval and consent of Plaintiff as successor in interest to Decedent's right and interest under the Agreement

37 As a consequence of the failure and refusal of these Defendants to recognize and continue to perform in accordance with their agreement, custom, usage and course of dealing with Decedent and their refusal to permit Plaintiff's involvement in the determination and implementation of policy and the conduct of the business of Ostler Property Development, Plaintiff does not have an adequate remedy at law against these Defendants and, is entitled to an order of the Court requiring these Defendants to specifically perform in accordance with their agreement, custom, usage and course of dealing with the Decedent and in particular

(a) To adopt and implement policies and business practices of Ostler Property Development only with the mutual consent of Plaintiff or his successor and Dale Ostler

(b) To forthwith call and conduct a meeting of the shareholders, with proper and timely notice to Plaintiff, and to there afford and permit Plaintiff his right to vote the shares of capital stock of Ostler Property Development which he holds as a shareholder of the company

(c) To elect or appoint members of Ostler Property Development's Board of Directors only upon proper and timely notice to Plaintiff or his successor, and the mutual consent of Plaintiff or his successors and Dale Ostler

(d) To not issue additional shares of capital stock of Ostler Property Development without the mutual consent of Plaintiff or his successor and Dale Ostler

(e) To disburse all net earnings of Ostler Property Development in accordance with the custom, course of dealing and agreement between Decedent and Dale Ostler unless otherwise mutually agreed between Plaintiff or his successor and Dale Ostler

In the event that the failure of these Defendants to perform in accordance with their agreement, custom and course of dealing with Decedent causes damage to Plaintiff then in that event, Plaintiff is entitled to judgment against such Defendants for damages in an amount to be determined by the Court

THIRD CLAIM FOR RELIEF

(Constructive Trust - Ostler International and Ostler Property Development Shares - Dale Ostler, Ostler International and Ostler Property Development)

38. Plaintiff incorporates herein the allegations contained in paragraphs 1 through 25 above.

39. The acquisition, holding and ownership of 50% of the shares of capital stock of Ostler International and of Ostler Property Development by Decedent and 50% by Dale Ostler was for the purpose of assuring that neither shareholder could, without the other of them, formulate and implement policy and business practices of Ostler of International and of Ostler Property Development. Their purpose was to assure that each would require the consent of the other to the operation and management of both of the companies.

40. It was not possible for any policy governing the conduct of the business of Ostler International or of Ostler Property Development to have been validly and legally formulated and implemented without the mutual consent and agreement of both shareholders.

41. Since Decedent's death, the policy and business of Ostler International and of Ostler Property Development has been undertaken and pursued by each company and by Dale Ostler all without notice to or the involvement, participation and consent of Plaintiff and all contrary to the purposes, agreement and course of dealing of Decedent and Dale Ostler as the shareholders of each company.

42. On principals of equity, Plaintiff is entitled to an order of the Court directed at Dale Ostler, Ostler International and Ostler Property Development declaring the imposition of a constructive trust on all of the shares of capital stock of Ostler International and of Ostler

Property Development, with said shares to be held for the joint and mutual benefit of Dale Ostler and Plaintiff and his successor.

FOURTH CLAIM FOR RELIEF

(Quasi - Contract - Unjust Enrichment - Dale Ostler)

43 Plaintiff incorporates herein the allegations contained in paragraphs 1 through 25 and paragraphs 39 through 41 above.

44 Decedent and Dale Ostler each thereby conferred a benefit on the other and each had knowledge of said benefit and voluntarily accepted such benefit from the other.

45. Dale Ostler now refuses to permit the policy and business of Ostler International and of Ostler Property Development to be developed and implemented by he and Plaintiff as shareholders of the companies and refuses to cause or permit each said company and its board of directors to condition the formulation and implementation of policy upon the mutual consent and agreement of said shareholders and consequently by his inaction or improper action causes and permits each of the companies to pursue policies and practices to the financial advantage and benefit of Dale Ostler and the disadvantage of Plaintiff causing Dale Ostler to be unjustly enriched thereby.

46. As a consequence of the unjust enrichment of Dale Ostler, Plaintiff has sustained damages in an amount to be determined by the Court and for which Plaintiff is entitled to judgment against Dale Ostler.

FIFTH CLAIM FOR RELIEF

(Breach of Fiduciary Duty - Dale Ostler and Vyron Ostler)

47. Plaintiff incorporates herein the allegations contained in paragraphs 1 thorough 28, 33 and 34, above

48 Dale Ostler and Vyron Ostler as directors and officers of Ostler International and of Ostler Property Development owe a fiduciary duty to Plaintiff, as a shareholder of each company, to neither adopt or implement any policy or conduct any business of such company contrary to Plaintiff's interest as a shareholder in the company and his rights as agreed and extended pursuant to Decedent's agreement express or implied with Dale Ostler and their custom, usage and course of dealing and that of the directors and officers of each company

49 Dale Ostler and Vyron Ostler have breached their fiduciary duty to Plaintiff by engaging in the conduct as more particularly set forth in paragraph 25, above

50. As a consequence of the breach by said Defendants of their fiduciary duty owing to Plaintiff, Plaintiff as successor in interest to Decedent, has sustained damages in an amount to be determined by the Court and for which Plaintiff is entitled to judgment against Dale Ostler and Vyron Ostler, jointly and severally.

SIXTH CLAIM FOR RELIEF

(Promissory Estoppel - Dale Ostler)

51 Plaintiff incorporates herein the allegations contained in paragraphs 1 through 25 above

52. Decedent and Dale Ostler as shareholders of Ostler International and of Ostler Property Development, promised each other that policies for the operation and conduct of the

business of each company would be adopted and implemented only with and based upon their mutual consent

53 Decedent acted in reasonable reliance on the promises made by Dale Ostler who should and did reasonably expect Decedent to so rely and as a consequence thereof, Decedent did similarly promise to Dale Ostler and in so doing, did not adopt or implement any policy of Ostler International or of Ostler Property Development without the consent of Dale Ostler

54 Dale Ostler was aware of the mutual promises so made by he and Decedent and of all facts material thereto and knew that Decedent relied on Dale Ostler's promises so made

55. As a consequence of the failure and refusal of Dale Ostler to recognize and continue to perform in accordance with his promises made to Decedent and his refusal to permit Plaintiff's involvement in the determination and implementation of policy and the conduct of the business of Ostler International and of Ostler Property Development, Plaintiff does not have an adequate remedy at law against Dale Ostler and, is entitled to an order of the Court requiring Dale Ostler to specifically perform in accordance with his promises made to Decedent and in particular.

(a) To adopt and implement policies and business practices of Ostler International and Ostler Property Development only with the mutual consent of Plaintiff or his successor and Dale Ostler.

(b) To forthwith call and conduct a meeting of the shareholders, with proper and timely notice to Plaintiff, and to there afford and permit Plaintiff his right to vote the shares of capital stock of Ostler International and of Ostler Property Development which he holds as a shareholder of each company

(c) To elect or appoint members of the Board of Directors of Ostler International and of Ostler Property Development only upon proper and timely notice to Plaintiff or his successor, and the mutual consent of Plaintiff or his successor and Dale Ostler.

(d) To not issue additional shares of capital stock of Ostler International and of Ostler Property Development without the mutual consent of Plaintiff or his successor and Dale Ostler.

(e) To disburse all net earnings of Ostler International and of Ostler Property Development in accordance with the custom, course of dealing and agreement between Decedent and Dale Ostler unless otherwise mutually agreed between Plaintiff or his successor and Dale Ostler.

In the event that the failure of Dale Ostler to perform in accordance with his promises made to Decedent causes damage to Plaintiff then in that event, Plaintiff is entitled to judgment against Dale Ostler for damages in an amount to be determined by the Court.

SEVENTH CLAIM FOR RELIEF

(Accounting - All Defendants)

56. Plaintiff incorporates herein the allegations contained in paragraphs 1 through 25 above.

57. Plaintiff is entitled to an order of the Court requiring that Defendants provide to Plaintiff during the pendency of this action, (1) all of the records, information and reports of Ostler International and of Ostler Property Development as contemplated and provided by §§ 16-10a-1601 and 16-10a-1602, Utah Code Ann. and not limited to excerpts from or summaries of

said records and reports In addition, Plaintiff is entitled to an order requiring that Defendants provide to Plaintiff during the pendency of this action, (2) an audited financial statement for each company for each calendar year prepared in accordance with generally accepted accounting principals, (3) unaudited financial statements for each company for each calendar month during the pendency of this action and showing in reasonable detail the assets and liabilities of the company and the results of the company's business operations, (4) the number of shares of capital stock of each company which on December 31, 2003 were proposed or committed to be issued to any person and the name of such person and (5) the number of shares of capital stock of each company which on December 1, 2004 were proposed or committed to be issued to any person and the name of each such person

EIGHTH CLAIM FOR RELIEF

(Declaratory Judgment - All Defendants)

58 Plaintiff incorporates herein the allegations contained in paragraphs 1 through 25 above

59 Plaintiff is entitled to judgment pursuant to §§ 78-33-1 through 78-33-13, Utah Code Annotated, declaring that Dale Ostler, Vyron Ostler, Ostler International, Ostler Property Development and all officers and directors of Ostler International and of Ostler Property Development are obligated to Plaintiff and Plaintiff's successors and assigns, as shareholders of the companies, and as follows

(a) To permit Plaintiff and Plaintiff's successors and assigns to be involved in the formulation and implementation of policies for the conducting of the business of Ostler International and of Ostler Property Development and to neither adopt or implement policies or conduct business of the companies to which Plaintiff or his successors and assigns are not in agreement

(b) To cause there to be called at least annually a meeting of shareholders of Ostler International and of Ostler Property Development and there permit Plaintiff or his successors and assigns the right and opportunity to vote their shares of capital stock of Ostler International and of Ostler Property Development

(c) To neither nominate, appoint or elect members of the Board of Directors of Ostler International and of Ostler Property Development without notice to, consulting with and obtaining the agreement of the Plaintiff or Plaintiff's successors and assigns

(d) To neither cause nor permit any current and existing members of the Board of Directors of Ostler International and of Ostler Property Development from serving or continuing to serve as Directors without the mutual consent of Dale Ostler and Plaintiff or Plaintiff's successor or assigns.

(e) To cause both Ostler International and Ostler Property Development to reacquire any shares of capital stock of such company issued without the consent of Decedent or Plaintiff and that such shares be reacquired by the issuing company with no cost, expense or loss to Plaintiff or any diminishment in the value of the shares of capital stock held by Plaintiff

(f) To not issue or cause to be issued any shares of the capital stock of Ostler International or of Ostler Property Development without the consent of Plaintiff or Plaintiff's successors or assigns

(g) To cause all or such fractional portion of the net income of Ostler International and of Ostler Property Development as historically disbursed to Decedent and to Dale Ostler, to be disbursed and paid over to shareholders regularly and approximately quarterly, unless consent and authorization is otherwise first obtained from Dale Ostler and from Plaintiff or Plaintiff's successors and assigns,

NINTH CLAIM FOR RELIEF

(Injunction - all Defendants)

60 Plaintiff incorporates herein the allegations contained in paragraphs 1 through 25 above

61 Plaintiff is entitled to a temporary restraining order and a preliminary injunction during the pendency of this action enjoining Defendants from

(a) Preventing or discouraging Plaintiff and Plaintiff's successors and assigns from being engaged in the formulation and implementation of policies for the conducting of the business of Ostler International and of Ostler Property Development and from adopting or implementing policies to which Plaintiff or his successors and assigns are not in agreement

(b) Failing to cause there to be called at least annually a meeting of shareholders of Ostler International and of Ostler Property Development and there permitting Plaintiff or his successors and assigns the right and opportunity to vote their shares of capital stock of Ostler International and of Ostler Property Development

(c) Nominating, appointing or electing members of the Board of Directors of Ostler International and of Ostler Property Development without notice to, consulting with and obtaining the agreement of the Plaintiff or Plaintiff's successors and assigns

(d) Causing or permitting any current and existing members of the Board of Directors of Ostler International and of Ostler Property Development to serve or continuing to serve as Directors without the mutual consent of Dale Ostler and Plaintiff or Plaintiff's successor or assigns

(e) Issuing or causing to be issued any shares of the capital stock of Ostler International and of Ostler Property Development without the consent of Plaintiff or Plaintiff's successors or assigns

(f) Permitting or accepting the voting of any shares of the capital stock of Ostler International and of Ostler Property Development issued without the consent of Decedent or of Plaintiff or Plaintiff's successors or assigns

(g) Failing to disburse and pay over to Shareholders of Ostler International and Ostler Property Development regularly and approximately quarterly all or such fractional portion of the net income of each company as historically disbursed to Decedent and to Dale Ostler, unless consent and authorization is otherwise first obtained from Dale Ostler and from Plaintiff or Plaintiff's successors and assigns

62 Plaintiff is entitled, at the conclusion of this action, to a permanent injunction enjoining the Defendants, their successors and any assigns all as provided in paragraph 61, and further, from causing or permitting, without the written mutual approval and consent of Dale Ostler and Plaintiff or Plaintiff's successors and assigns, the adoption or implementation of any policy of Ostler International or of Ostler Property Development or the causing of either company to engage in or conduct its business

WHEREFORE, Plaintiff prays for judgment against the Defendants as follows

1 On his FIRST CLAIM FOR RELIEF, for a decree of specific performance against Dale Ostler, Vyron Ostler and Ostler International requiring the performance by said Defendants, their successors and assigns all as provided in paragraph 31 and for judgment against said Defendants for damages in an amount to be determined by the Court and such other relief as the Court may deem proper in the premises

2 On his SECOND CLAIM FOR RELIEF, for a decree of specific performance against Dale Ostler, Vyron Ostler and Ostler Property Development requiring the performance by said Defendants, their successors and assigns all as provided in paragraph 37 and for judgment against said Defendants for damages in an amount to be determined by the Court and such other relief as the Court may deem proper in the premises

3 On his THIRD CLAIM FOR RELIEF, for an order of the Court directed at Dale Ostler, Ostler International and Ostler Property Development imposing and creating a constructive trust on all of the shares of capital stock of Ostler International and of Ostler

Property Development with said shares to be held for the joint and mutual benefit of Dale Ostler and Plaintiff and his successor Plaintiff further prays for such other relief as the Court may deem proper in the premises

4 On his FOURTH CLAIM FOR RELIEF, for judgment against Dale Ostler for damages in an amount to be determined by the Court and such other relief as the Court may deem proper in the premises

5. On his FIFTH CLAIM FOR RELIEF, for judgment against Dale Ostler and Vyron Ostler, jointly and severally, for damages in an amount to be determined by the Court and such other relief as the Court may deem proper in the premises.

6. On his SIXTH CLAIM FOR RELIEF, for a decree of specific performance against Dale Ostler requiring the performance by said Defendant, his successors and assigns all as provided in paragraph 55 and for judgment against said Defendant for damages in an amount to be determined by the Court and such other relief as the Court may deem proper in the premises

7 On his SEVENTH CLAIM FOR RELIEF, for an order declaring and requiring that Defendants and each of them, provide an accounting and information in accordance with and pursuant to the requirements as set forth in paragraph 57 of the Complaint

8. On his EIGHTH CLAIM FOR RELIEF, for a judgment declaring that Dale Ostler, Vyron Ostler, Ostler International, Ostler Property Development and the other officers and directors of Ostler International and of Ostler Property Development are obligated, as a matter of law, to Plaintiff and Plaintiff's successors and assigns to adopt and implement policy of and for Ostler International and for Ostler Property Development and to conduct the business of each

company only in accordance with and pursuant to the requirements as set forth in paragraph 59 of this Complaint.

9 On his NINTH CLAIM FOR RELIEF, for a temporary restraining order and a preliminary injunction during the pendency of this action enjoining Defendants, their successors and assigns all as provided in paragraph 61 of this Complaint Further, for a permanent injunction to be issued at the conclusion hereof enjoining the Defendants, their successors and any assigns all as provided in paragraph 61, and from causing or permitting, without the written mutual approval and consent of Dale Ostler and Plaintiff or Plaintiff's successors and assigns, the adoption or implementation of any policy of Ostler International and of Ostler Property Development or the causing of Ostler International or Ostler Property Development to engage in or conduct its business without the mutual approval and consent of Dale Ostler or any of his assigns, and of Plaintiff or his successors and assigns

10. On ALL CLAIMS FOR RELIEF for costs of court and such further relief as the Court may deem proper in the premises

DATED this 15th day of December, 2004.

NIELSEN & SENIOR

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UTAH CORPORATION AND BUSINESS LAW MANUAL WITH OFFICIAL FORMS AND COMMENTARY

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LexisNexis™

Official Commentary To Utah Revised Business Corporation Act

PREPARED BY THE UTAH BUSINESS ACT REVISION COMMITTEE OF THE BUSINESS LAW SECTION OF THE UTAH STATE BAR

Introductory Note

The Utah Revised Business Corporation Act adopted in 1992 (the "Revised Act") replaces the Utah Business Corporation Act originally enacted in 1961 (the "Prior Act"). The drafting of the Revised Act for initial presentation to the Utah legislature was accomplished through the efforts of the Utah Business Corporation Act Revision Committee (the "Committee") established through the Business Law Section of the Utah State Bar, in cooperation with Representative Nancy Lyon and the Legislative Research and General Counsel's Office. The Revised Act follows generally the 1984 Revised Business Corporation Act, as subsequently modified (the "Model Act"), adopted by the Committee on Corporate Laws of the Business Law Section of the American Bar Association. In preparing the Revised Act, the Committee modified various Model Act provisions to address concerns and issues raised by Committee members, to retain certain Prior Act provisions considered to be appropriate, to incorporate statutory provisions that have been proposed in Colorado and adopted in other states, and to respond to comments received by interested Utah companies and individuals.

The Model Act is accompanied by Official Comments that were considered, approved and adopted by the Committee on Corporate Laws. We believe that such a commentary can be helpful to business persons and legal practitioners trying to understand, interpret and comply with the provisions of the Revised Act, and the availability of such a commentary was a motivating factor in enacting a corporations code based on the Model Act. Accordingly, the commentary to the Model Act has been reproduced, revised and adapted for use with the Revised Act. This action has been taken with the consent of Prentice Hall Law & Business, the publisher of the Model Act and related Official Comments. Since the following commentary has been revised from the form of Official Comments published with the Model Act, in order to address matters of interest to Utah practitioners and to reflect significant changes made from the Model Act and the Prior Act, this Committee takes full responsibility for the form and content of the commentary. Neither the ABA Committee on Corporate Law, nor the publisher of the Model Act and the associated Official Commentary has reviewed or approved the following commentary.

This commentary is intended to provide an explanation of the meaning, purpose, application and historical development of referenced sections of the Revised Act. It also describes some of the substantive decisions made in the drafting of the Revised Act and highlights certain differences between the Model Act, the Revised Act and the Prior Act. The Utah legislature has endorsed the use of this commentary as an aid in understanding and interpreting the Revised Act, and directed that it be published as a companion to the Revised Act.

The numbers set forth below correspond to the sections of the Revised Act to which the comments relate.

As the Revised Act was put into bill form by the Legislative Research and General Counsel's office, a number of minor modifications were made so that the statutory language would tional and grammatical constructions preferred by that office. These changes were not intended to modify the substantive meaning of the affected provisions of the Revised Act. Accordingly, a person comparing the language of the Revised Act to the language of the Model Act should not assume that any minor wording or grammatical differences were intended to modify the meaning of the statute. The types of changes made by the Legislative Research and General Counsel's office include the elimination of subheadings, the removal of parenthesis, deletion of uses of the word "such," and changing of references to the words "shall," "may" and "will". Many of the language changes that were intended to affect the statutory meaning are identified in the following commentary.

PART 1

GENERAL PROVISIONS

The sections of Part 1 have been rearranged from the order in which they appear in the Model Act. We have also omitted a provision intended to give the legislature the power to amend or repeal all or part of the Revised Act. That provision was determined to be unnecessary, as the Utah Constitution includes a provision mandating the reservation of power to amend or modify corporate statutes (Utah Const. Art. XII Section 1). For this reason, similar statutory language found in earlier versions of the Model Act was left out of the Prior Act. We understand there is currently an effort in progress to update and simplify the provisions of the Utah Constitution relating to corporations. If the above-referenced language is deleted from the Utah Constitution, appropriate language should be added to the Revised Act to clarify the legislature's ability to amend or modify the Revised Act from time to time.

Subpart A

Short Title, Definitions and Powers of Division

The index and headings of the Model Act are divided into Chapters and Subchapters. For purposes of the Revised Act, the Chapter headings were changed to Parts, to be consistent with a recent change in the preferred formatting of the Utah Code. The Legislative Research Counsel's Office deleted all subheadings from the Revised Act, apparently because of a policy against two levels of headings. Since one of the objectives of enacting the Revised Act was to enhance ease of use and organization of the statute, as well as consistency with the Model Act, we have retained the subpart headings for purposes of this commentary. For readers of the Revised Act wondering why there are jumps in the numbering of sections within each Part, it was intended that the numbering change after each subpart heading.

101. Short Title

The short title provided by this section creates a convenient name for the state's business corporation act.

102. Definitions

This section collects definitions of terms used throughout the Revised Act. Parts and sections of the Revised Act in a few instances contain specialized definitions applicable only to those parts or sections. Some of the definitions found in the Model Act have been omitted from the Revised Act since they the trust agreement and the shares must be registered in the name of the trustee. Typically, the trust agreement provides that all attributes of beneficial ownership other than the power to vote are retained by the beneficial owners. In addition, the voting trustees may issue to the beneficial owners voting trust certificates which may be transferable in much the same way as shares

Upon the creation of the voting trust, the trustees must prepare a list of the beneficial owners and deliver it, together with a copy of the agreement, to the corporation's principal office, where both documents are available for inspection by shareholders under section 720. This simple disclosure requirement eliminates the possibility that the voting trust may be used to create "secret, uncontrolled combinations of stockholders to acquire control of the corporation to the possible detriment of non-participating shareholders." *Lehrman v. Cohen*, 222 A.2d 800, 807 (Del. 1966).

The purpose of section 730 is not to impose narrow or technical requirements on voting trusts. For example, a voting trust that by its terms extends beyond the 10-year maximum should be treated as being valid for the maximum permissible term of 10 years.

b. *Extension or Renewal of Voting Trust.*

Section 730(3) permits a voting trust to be extended for successive terms of up to 10 years, commencing with the date the first shareholder signs the extension agreement. Shareholders who do not agree to an extension are entitled to the return of their shares upon the expiration of the original term.

731. Voting Agreements

Section 731(1) explicitly recognizes agreements among two or more shareholders as to the voting of shares and makes clear that these agreements are not subject to the rules relating to a voting trust. These agreements are often referred to as "pooling agreements." The only formal requirements are :hat they be in writing and signed by all the participating ihareholders; in other respects their validity is to be judged as iny other contract. They are not subject to the 10-year imitation applicable to voting trusts.

Section 731(2) provides that voting agreements may be pecifically enforceable. A voting agreement may provide its wn enforcement mechanism, as by the appointment of a roxy to vote all shares subject to the agreement; the appointient may be made irrevocable under section 722. If no iforcement mechanism is provided, a court may order spefic enforcement of the agreement and order the votes cast as ie agreement contemplates. This section recognizes that images are not likely to be an appropriate remedy for breach a voting agreement, and also avoids the result reached in *ngling Bros. Barnam & Bailey Combined Shows v. Ringling*, 2d 441 (Del. 1947), where the court held that the appropri- remedy to enforce a pooling agreement was to refuse to rmit any voting of the breaching party's shares.

2. Shareholder Agreements

Shareholders of closely-held corporations, ranging from ily businesses to joint ventures owned by large public porations, frequently enter into agreements that govern operation of the enterprise. In the past, various types of reholder agreements were invalidated by courts for a iety of reasons, including so-called "sterilization" of the rd of directors and failure to follow the statutory norms of applicable corporation act. See, e.g., *Long Park, Inc. v. iton-New Brunswick Theatres Co.*, 297 N.Y. 174, 77 N.E.2d (1948). The more modern decisions reflect a greater ngness to uphold shareholder agreements. See, e.g., *er v. Galler*, 32 Ill. 2d 16, 203 N.E.2d 577 (1964). In tion, many state corporation acts now contain provisions lating shareholder agreements. Earlier versions of the Model Act had never expressly validated shareholder agreements.

Rather than relying on further uncertain and sporadic development of the law in the courts, section 732, which was added to the Model Act in 1991, rejects the older line of cases It adds an important element of predictability previously absent from the Model Act and affords participants in closely-held corporations greater contractual freedom to tailor the rules of their enterprise. The drafters have elected to add section 732 of the Model Act to the Revised Act.

Section 732 is not intended to establish or legitimize an alternative form of corporation. Instead, it is intended to add, within the context of the traditional corporate structure, legal certainty to shareholder agreements that embody various aspects of the business arrangement established by the shareholders to meet their business and personal needs. The subject matter of these arrangements includes governance of the entity, allocation of the economic return from the business, and other aspects of the relationships among shareholders, directors and the corporation which are part of the business arrangement. Section 732 also recognizes that many of the corporate norms contained in the Model Act (and Revised Act), as well as the corporation statutes of most states, were designed with an eye towards public companies, where management and share ownership are quite distinct. Cf. 1 O'Neal & Thompson, O'Neal's Close Corporations, section 5.06 (3d ed.). These functions are often conjoined in the close corporation. Thus, section 732 validates for nonpublic corporations various types of agreements among shareholders even when the agreements are inconsistent with the statutory norms contained in the Model Act and Revised Act.

Importantly, section 732 only addresses the parties to the shareholder agreement, their transferees, and the corporation, and does not have any binding legal effect on the state, creditors, or other third persons.

Section 732 supplements the other provisions of the Model Act and Revised Act. If an agreement is not in conflict with another section of the Revised Act, no resort need be made to section 732, with its requirement of unanimity. For example, special provisions can be included in the articles of incorporation or bylaws with less than unanimous shareholder agreement so long as such provisions are not in conflict with other provisions of the Revised Act. Similarly, section 732 would not have to be relied upon to validate typical buy-sell agreements among two or more shareholders or the covenants and other terms of a stock purchase agreement entered into in connection with the issuance of shares by a corporation.

The types of provisions validated by section 732 are many and varied. Section 732(1) defines the range of permissible subject matter for shareholder agreements largely by illustration, enumerating seven types of agreements that are expressly validated to the extent they would not be valid absent section 732. The enumeration of these types of agreements is not exclusive; nor should it give rise to a negative inference that an agreement of a type that is or might be embraced by one of the categories of section 732(1) is, ipso facto, a type of agreement that is not valid unless it complies with section 732. Section 732(1) also contain a "catch all" which adds a measure of flexibility to the seven enumerated categories.

Omitted from the enumeration in section 732(1) is a provision found in the Close Corporation Supplement and in the statutes of many of the states, broadly validating any arrangement the effect of which is to treat the corporation as a partnership. This type of provision was considered to be too elastic and indefinite, as well as unnecessary in light of the more detailed enumeration of permissible subject areas contained in section 732(1). Note, however, that under section 732(6) the fact that an agreement authorized by section 732(1 or its performance treats the corporation as a partnership i not a ground for imposing personal liability on the parties if the agreement is otherwise authorized by subsection (1).

a. *Section 732(1).*

Subsection (1) is the heart of section 732. It states that certain types of agreements are effective among the shareholders and the corporation even if inconsistent with another provision of the Revised Act. Thus, an agreement authorized by section 732 is, by virtue of that section, "not inconsistent with law" within the meaning of sections 202(2)(b) and 206(2) of the Revised Act. In contrast, a shareholder agreement that is not inconsistent with any provisions of the Revised Act is not subject to the requirements of section 732.

The range of agreements validated by section 732(1) is expansive, though not unlimited. The most difficult problem encountered in crafting a shareholder agreement validation provision is to determine the reach of the provision. Some states have tried to articulate the limits of a shareholder agreement validation provision in terms of negative grounds, stating that no shareholder agreement shall be invalid on certain specified grounds. *See e.g.* Del. Code Ann. Tit. 8, sections 350, 354 (1983); N.C. Gen. Stat. section 55-73(b)(1982). The deficiency in this type of statute is the uncertainty introduced by the ever present possibility of articulating another ground on which to challenge the validity of the agreement. Other states have provided that shareholder agreements may waive or alter all provisions in the corporation act except certain enumerated provisions that cannot be varied. *See e.g.,* Cal. Corp. Code section 300(b)-(c) (West 1989 and Supp. 1990). The difficulty with this approach is that any enumeration of the provisions that can never be varied will almost inevitably be subjective, arbitrary, and incomplete.

The approach chosen in section 732 is more pragmatic. It defines the types of agreements that can be validated largely by illustration. The seven specific categories that are listed are designed to cover the most frequently used arrangements. The outer boundary is provided by section 732(1)(h), which provides an additional "catch all" for any provisions that, in a manner inconsistent with any other provision of the Revised Act, otherwise govern the exercise of the corporate powers, the management of the business and affairs of the corporation, or the relationship between and among the shareholders, the directors, and the corporation or any of them. Section 732(1) validates virtually all types of shareholder agreements that, in practice, normally concern shareholders and their advisors.

Given the breadth of section 732(1), any provision that may be contained in the articles of incorporation with a majority vote under sections 202(2)(b)(i) and (ii), as well as under section 841 may also be effective if contained in a shareholder agreement that complies with section 732.

The provisions of a shareholder agreement authorized by section 732(1) will often, in operation, conflict with the literal language of more than one section of the Revised Act, and courts should in such cases construe all related sections of the Revised Act flexibly and in a manner consistent with the underlying intent of the shareholder agreement. Thus, for example, in the case of an agreement that provides for weighted voting by directors, every reference in the Revised Act to a majority or other proportion of directors should be construed to refer to a majority or other proportion of the votes of the directors.

While the outer limits of the catch-all provision of subsection 732(1)(h) are left uncertain, there are provisions of the Revised Act that cannot be overridden by resort to the catch-all. Subsection (1)(h), introduced by the term "otherwise," is intended to be read in context with the preceding seven subsections and to be subject to a *ejusdem generis* rule of construction. Thus, in defining the outer limits, courts should consider whether the variation from the Revised Act under consideration is similar to the variations permitted by the first seven subsections. Subsection (1)(h) is also subject to a public policy limitation, intended to give courts express authority to restrict the scope of the catch-all where there are substantial issues of public policy at stake. For example, a shareholder agreement that provides that the directors of the corporation have no duties of care or loyalty to the corporation or the shareholders would not be within the purview of section 732(1)(h), because it is not sufficiently similar to the types of arrangements suggested by the first seven subsections of section 732(1) and because such a provision could be viewed as contrary to a public policy of substantial importance. Similarly, a provision that exculpates directors from liability more broadly than permitted by section 841 likely would not be validated under section 732, because as the commentary to section 841 states, there are serious public policy reasons which support the few limitations that remain on the right to exculpate directors from liability. Further development of the outer limits is left, however, for the courts.

As noted above, shareholder agreements otherwise validated by section 732 are not legally binding on the state, on creditors, or on other third parties. For example, an agreement that dispenses with the need to make corporate filings required by the Revised Act would be ineffective. Similarly, an agreement among shareholders that provides that only the president has authority to enter into contracts for the corporation would not, without more, be binding against third parties, and ordinary principles of agency, including the concept of apparent authority, would continue to apply.

b. *Section 732(2).*

Section 732 minimizes the formal requirements for a shareholder agreement so as not to restrict unduly the shareholders' ability to take advantage of the flexibility the section provides. Thus, unlike comparable provisions in special close corporation legislation, it is not necessary to "opt in" to a special class of close corporations in order to obtain the benefits of section 732. An agreement can be validated under section 732 whether it is set forth in the articles of incorporation, the bylaws or in a separate agreement, and whether or not section 732 is specifically referenced in the agreement. The principal requirements aresimply that the agreement be in writing and be approved or agreed to by all persons who are then shareholders. Where the corporation has a single shareholder, the requirement of an "agreement among the shareholders" is satisfied by the unilateral action of the shareholder in establishing the terms of the agreement, evidenced by provisions in the articles or bylaws, or in a writing signed by the sole shareholder. Although a writing signed by all the shareholders is not required where the agreement is contained in articles of incorporation or bylaws unanimously approved, it may be desirable to have all the shareholders actually sign the instrument in order to establish unequivocally their agreement. Similarly, while transferees are bound by a valid shareholder agreement, it may be desirable to obtain the affirmative written assent of the transferee at the time of the transfer. Subsection (2) also established and permits amendments by less than unanimous agreement if the shareholder agreement so provides.

Section 732(2) requires unanimous shareholder approval regardless of entitlement to vote. Unanimity is required because an agreement authorized by section 732 can effect material organic changes in the corporation's operation and structure, and in the rights and obligations of shareholders.

The requirement that the shareholder agreement be made known to the corporation is the predicate for the requirement in subsection (3) that share certificates or information statements be legended to note the existence of the agreement. No specific form of notification is required and the agreement need not be filed with the corporation. In the case of shareholder agreements in the articles or bylaws, the corporation will necessarily have notice. In the case of shareholder agreements outside the articles or bylaws, the requirement of signature by all of the shareholders will in virtually all cases be sufficient to constitute notification to the corporation, as one or more signatories will normally also be a director or an officer.

c. *Section 732(3).*

Section 732(3) addresses the effect of a shareholder agreement on subsequent purchasers or transferees of shares. Typically, corporations with shareholder agreements also have restrictions on the transferability of the shares as authorized by section 627 of the Revised Act, thus lessening the practical effects of the problem in the context of voluntary transferees. Transferees of shares without knowledge of the agreement or those acquiring shares upon the death of an original participant in a close corporation may, however, be heavily impacted. Weighing the burdens on transferees against the burdens on the remaining shareholders in the enterprise, section 732(3) affirms the continued validity of the shareholder agreement on all transferees, whether by purchase, gift, operation of law, or otherwise. Unlike restrictions on transfer, it may be impossible to enforce a shareholder agreement against less than all of the shareholders. Thus, under section 732, one who inherits shares subject to a shareholder agreement must continue to abide by the agreement. If that is not the desired result, care must be exercised at the initiation of the shareholder agreement to ensure a different outcome, such as providing for a buy-back upon death.

Where shares are transferred to a purchaser without knowledge of a shareholder agreement, the validity of the agreement is similarly unaffected, but the purchaser is afforded a rescission remedy against the seller. The term "purchaser" imports consideration. Under subsection (3) the time at which notice to a purchaser is relevant for purposes of determining entitlement to rescission is the time when a purchaser acquires the shares rather than when a commitment is made to acquire the shares. If the purchaser learns of the agreement after becoming committed to purchase but before the acquisition of the shares, the purchaser should not be permitted to proceed with the purchase and still obtain the benefits of the remedies in section 732(3). Moreover, under contract principles and the securities laws a failure to disclose the existence of a shareholder agreement would in most cases constitute the omission of a material fact and may excuse performance of the commitment to purchase. The term purchaser includes a person acquiring shares upon initial issue or by transfer, and also includes a pledgee, for whom the time of purchase is the time the shares are pledged.

Section 732 addresses the underlying rights that accrue to shares and shareholders and the validity of shareholder action which redefines those rights, as contrasted with questions regarding entitlement to ownership of the security, competing ownership claims, and disclosure issues. Consistent with this dichotomy, the rights and remedies available to purchasers under section 732(3) are independent of those provided by contract law, article 8 of the Uniform Commercial Code, the securities laws and others outside the Revised Act. With respect to the related subject of restrictions on transferability of shares, note that section 732 does not directly address or validate such restrictions, which are governed instead by section 627 of the Act. However, if such restrictions are adopted as a part of a shareholder agreement that complies with the requirements of section 732, a court should construe broadly the concept of reasonableness under section 627 in determining the validity of such restrictions.

Section 732(3) contains an affirmative requirement that the share certificate or information statement for the shares be legended to note the existence of a shareholder agreement. No specified form of legend is required, and a simple statement that "[t]he shares represented by this certificate are subject to a shareholder agreement" is sufficient. At that point a purchaser must obtain a copy of the shareholder agreement from the transferor or proceed at the purchaser's peril. In the event a corporation fails to legend share certificates or information statements, a court may, in an appropriate case, imply a cause of action against the corporation in favor of an injured purchaser without knowledge of a shareholder agreement. The circumstances under which such a remedy would be implied, the proper measure of damages, and other attributes of and limitations on such an implied remedy are left to development in the courts.

If the purchaser has no actual knowledge of a shareholder agreement, and is not charged with knowledge by virtue of a legend on the certificate or information statement, the purchaser has a rescission remedy against the transferor (which would be the corporation in the case of a new issue of shares). While the statutory rescission remedy provided in subsection (3) is nonexclusive, it is intended to be a purchaser's primary remedy.

If the shares are certificated and duly legended, a purchaser is charged with notice of the shareholder agreement even if the purchaser never saw the certificate. Thus, a purchaser is exposed to risk if the purchaser does not ask to see the certificate at or prior to the purchase of the shares. In the case of uncertificated shares, however, the purchaser is not charged with notice of the shareholder agreement unless a duly-legended information statement is delivered to the purchaser at or prior to the time of purchase. This different rule for uncertificated shares is intended to provide an additional safeguard to protect innocent purchasers, and is necessary because section 626(2) of the Revised Act and section 8-408 of the U.C.C. permit delivery of information statements after a transfer of shares.

d. *Section 732(4).*

Section 732(4) contains a self-executing termination provision for a shareholder agreement when the shares of the corporation become publicly held. The statutory norms in the Revised Act become more necessary and appropriate as the number of shareholders increases, as there is greater opportunity to acquire or dispose of an investment in the corporation, and as there is less opportunity for negotiation over the terms under which the enterprise will be conducted. Given that section 732 requires unanimity, however, in most cases a practical limit on the availability of a shareholder agreement will be reached before a public market develops. Subsection (4) rejects the use of an absolute number of shareholders in determining when the shelter of section 732 is lost.

Section 732(5) through (7) contain a number of technical provisions. Subsection (5) provides a shift of liability from the directors to any person or persons in whom the discretion or powers otherwise exercised by the board of directors are vested. A shareholder agreement which provides for such a shift of responsibility, with the concomitant shift of liability provided by subsection (5), could also provide for exculpation from that liability to the extent otherwise authorized by the Revised Act. The transfer of liability provided by subsection (5) covers liabilities imposed on directors "by law," which is intended to include liabilities arising under the Revised Act, the common law, and statutory law outside the Revised Act. Nevertheless, there could be cases where subsection (5) is ineffective and where a director is exposed to liability *qua* director, even though under a shareholder agreement the director may have given up some or all of the powers normally exercised by directors.

Subsection (6), based on the Close Corporation Supplement of the Model Act and the Texas statute, narrows the grounds for imposing personal liability on shareholders for the liabilities of a corporation for acts or omissions authorized

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